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Union Pacific Railroad Co. v. Structural Steel & Forge Co. : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

UNION PACIFIC RAILROAD COMPANY, a corporation,
Plaintiff and Respondent,

vs.

STRUCTURAL STEEL & FORGE CO., a corporation,
Defendant and Appellant.

Case No. 8785

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Respondent in its brief has raised new matter to which this reply brief is addressed.

POINT I.

THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT CREATE CONCURRENT JURISDICTION IN THE INTERSTATE COMMERCE COMMISSION OVER THESE CASES.

Appellant contends that before one even considers whether the subject matter of these cases comes within the doctrine of primary jurisdiction, it must be shown that the administrative agency has jurisdiction over the parties concurrent with that of the court which would make the referral.

The Railroad concedes that there is no statute allowing it to initiate an original proceeding in these cases before the Interstate Commerce Commission (Respdt's br. p. 18) but it seems to find concurrent jurisdiction in the Interstate Commerce Commission merely because these cases involve questions dealing with interstate commerce (Respdt's br. p. 16). The Railroad contends that the

source of the original state court jurisdiction in these cases is not the state Constitution, but is created through the beneficence of Congress in its exclusive right to regulate interstate commerce. (Respdt's br. p. 29). For this reason the Railroad contends that jurisdiction of the Interstate Commerce Commission is not only "primary" but "exclusive" (Respdt's br. p. 18). This position is understandable, because the Railroad recognizes it must find a jurisdictional basis for the Interstate Commerce Commission to act in a case of this nature.

The Railroad's argument on this point seems to be that it could have, if it had wished, commenced these proceedings against defendant before the Interstate Commerce Commission, although it concedes there is no statute authorizing this, because of the bare bones of the commerce clause.

This contention is just not the law, as an elemental analysis of the workings of the Federal-State system will show. These are actions for money due under contracts of carriage. Such actions from time immemorial can be brought wherever the plaintiff can successfully obtain jurisdiction over defendant. In this case plaintiff succeeded in obtaining jurisdiction over the defendant in the state courts of Utah. The Interstate Commerce Act made no change at all in this state of affairs. In fact Section 22 of that Act expressly provided that nothing

in the Act would abridge or alter rights then existing in common law. Certainly the Railroad cannot contend that the commerce clause of the United States Constitution vests in the Interstate Commerce Commission concurrent jurisdiction with the State or Federal court of all matters merely because they involve interstate commerce. This argument reduced to absurdity would vest in the Commission concurrent jurisdiction to determine rights in actions involving collisions of motor vehicles which are interstate carriers. It is true that the federal judiciary has by development of the concept of primary jurisdiction *limited* the rights of all courts (State and Federal) in certain cases involving certain issues to decide these without prior recourse to the Interstate Commerce Commission — but this is a far different thing from contending that the Interstate Commerce Act *created* a right in the state courts.

Merely to restate the common law development of the doctrine of primary jurisdiction does not solve the question before this court, because these questions are: (1) Do these cases involve the issues generally considered subject to referral to the Interstate Commerce Commission? (2) Even if such issues are present, can such a referral be made where the Interstate Commerce Commission has no jurisdiction over the party objecting to the referral?

Stated differently, does the Interstate Commerce Commission have primary jurisdiction over the subject matter involved here, and if so, does it have jurisdiction over the persons?

POINT II.

THE INTERSTATE COMMERCE COMMISSION HAS NO JURISDICTION OVER THE APPELLANT.

Respondent contends that if Congress merely repealed Section 22 of the Interstate Commerce Act, Congress would "completely remove concurrent jurisdiction from state courts in the field of interstate commerce" (Respdt's br. p. 30) The matter is certainly not that simple. Respondent cites *Pennsylvania R. Co.* v. *Puritan Coal Min. Co.*, 237 US 121, 130, 35 Sup. Ct. 484, 59 L. Ed 867 (1915), where the United States Supreme Court, in discussing Section 22, stated that without this section "it *might* have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts, and this clause was added to indicate that the commerce act, in giving rights of action in Federal courts was not intended to deprive the state courts of their general and concurrent jurisdiction." (emphasis added) First, of course, *Puritan Coal* was an action where the state court was held to have properly exercised its juridiction in not referring. Secondly it was an ac-

tion brought by a shipper against a carrier. The problem was whether, when Section 9 of the Act expressly gave the shipper alternative remedies to bring such an action before either the Commission or a federal court, the shipper could choose a third alternative (i.e. the state courts). The Supreme Court said that by reason of Section 22 it could. There Section 9 and Section 22 construed together were held to have preserved the jurisdiction of the state court.

But the Act is completely silent about claims by carrier against the shipper. In such a case Section 22 clearly indicates that the Railroad is relegated to its common law rights. The fact that Congress might have the *power* to compel state courts to abdicate their common law jurisdiction in certain fields is moot and academic. In reality, Congress has not attempted to do so. As appellant pointed out, the powers of a state court are pre-empted by federal legislation only when the enactment in question so states (Applt's br. p. 20).

The very authorities cited by respondent show that the doctrine of primary jurisdiction applies only where the agency is vested with jurisdiction by appropriate legislation.

Thus, respondent quotes a United States District Court in Washington as stating "The substance of the doctrine is that where *by appropriate legisla-*

tion an administrative agency is vested with jurisdiction * * * ". (Respdt's br. p. 11, emphasis added, quoting from *Ellison* v. *Rayonier*, Inc. 156 F. Supp. 214 (W.D. Wash. 1957)). In that case the defendant had moved to dismiss claiming that the Washington Water Pollution Control Act had vested in the Pollution Control Commission primary jurisdiction to determine standards of actionable pollution of state waters. The statutes cited in the decision show that the Commission was expressly given power to control and prevent pollution and to adopt rules, regulations and standards, and gave it the power to make determinations. There can be no question but that the Commission there had express jurisdiction over an alleged polluter.

The Railroad appears to contend that because courts have restricted their jurisdiction over certain subject matter in cases where the Interstate Commerce Commission was given (by express act of Congress) concurrent jurisdiction over the person requesting a referral, whenever such subject matter is involved the Interstate Commerce Commission has "exclusive" jurisdiction over the parties as well. This is a non sequitur. A trial court might well feel that a complex question of international law before it would more properly be subject matter to be submitted to the International Court of Justice at the Hague and the Justices there might relish

the opportunity to be of assistance. But unless there were jurisdictional grounds by which a party could be compelled to appear before that court (or both parties submitted to that jurisdiction) a court order sending them there would be a nullity.

Respondent has failed to cite one case where a state court has referred a matter to a federal administrative agency over the objection of the defendant shipper. It cites a very recent United States District Court decision where the judge in an opinion "hastily prepared without opportunity for contemplative consideration of language or exhaustive review and citation of authorities" (*United States* v. *Canfield Driveaway Co.*, 159 F. Supp. 448 at 449, (E.D. Mich., S.D. 1958)) at least shows awareness of the dilemma he is in.

He states:

> "In this case, however, it is the carrier whose charges have been paid in full, who insists that a reference be made. The court cannot find a spelling out of procedure whereby a carrier situated as the defendant in this case, would initiate a proceeding before the Interstate Commerce Commission. I do not find any decided case in which the application of the doctrine of primary jurisdiction applies, with the procedural background of the case at Bar." Id., at 455.

He further states:

> "Ordinarily, such an investigation would

have its beginning in a complaint by a shipper claiming to have been overcharged. In the case of *United States* v. *Western Pacific* and *United States* v. *Chesapeake & Ohio R. Co.*, the party seeking a referral was the shipper, the United States Government. In the case at Bar, the party seeking for a referral is the carrier, who in this litigation claims its charges were valid. No case has been cited to the Court wherein the precise procedure to be employed in making such a referral is announced. However, inasmuch as defendant is here asking for such a referral, the burden of initiating the procedure to invoke the aid of the Interstate Commerce Commission would be upon it." Id., at 456.

The floundering of the learned trial judge where he was admittedly acting without precedent, is hardly clear or convincing authority for the propriety of his action. Moreover, this was a case where the defendant, not the party instituting the original action, asked for the referral. The only other case cited by respondent on this point is *Northern Pac. Ry. Co.* v. *United States*, 213 F. 2d 366, (CCA-8, 1954) where the question of the federal court's jurisdictional power to refer is not even discussed.

A more recent case not cited by respondent is *New York, Susquehanna & Western R. Co.* v. *Follmer*, 254 F. 2d 510, (CCA-3, 1958). This was an action between two carriers dealing with division of receipts from joint through rates established by agreement. The defendant carrier requested and

obtained referral to the Interstate Commerce Commission. The United States Court of Appeals for the Third Circuit reversed the trial judge and ordered the order of referral vacated. In that case the carrier objecting to referral cited the opinion of Mr. Justice Jackson wherein he said:

> "If the court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. *But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose.*" *Montana-Dakota Utilities Co.*, v. *Northwestern Publ. Serv. Co.* 341 US 246, 254, 71 Sup. Ct. 692, 696, 95 L. Ed. 912 (1951). (emphasis added)

As the carrier seeking referral, according to the court, had "come up with some ingenious arguments in support of a view that the Commission does have original jurisdiction in these matters" the court preferred not to rest its decision upon this ground. *Id.*

But if this court does find that the commerce clause of the United States Constitution does not, of itself, give the Interstate Commerce Commission original jurisdiction of these cases (this being the sole argument upon which the railroad relies for

such jurisdiction) then it should follow the conclusion of Mr. Justice Jackson and hold referral improper.

If the commission had no concurrent initial jurisdiction then the sole basis for a referral would be as an accommodation to the Utah court, analogous to the situation of referral to a master. The Appellant in its original brief discussed at length the undesirability of, and inability of the state court to make, such referral on this ground. It is significant to note that the Court of Appeals for the Third Circuit in the *Follmer* case *supra* agreed with appellant's analogy to the case of referral to a master. That court discusses *LaBuy* v. *Howes Leather Co.*, 352 US 249, 77 Sup. Ct. 309, 1 L. Ed. 2d 290 (1957), and then says:

> "That case also emphasizes strongly the point of view that references to masterships, although provided for by the federal rules, should be very sparingly used by district judges. See Fed. Rules Civ. Proc. rule 53 (b), 28 U.S.C. See also *United States* v. *Kirkpatrick*, 3 Cir., 1951, 186 F.2d 393. We believe that the same attitude should be taken towards referrals to administrative agencies."

POINT III.

THE INTERSTATE COMMERCE COMMISSION DOES NOT HAVE PRIMARY JURISDICTION OVER THE SUBJECT MATTER.

Respondent inserted as an appendix the tariff in dispute in this action, as if to ask whether any

judge in his right mind would want to wrestle with such a verbal monster.

The railroad contends that because some of the words in this monstrosity have a "peculiar meaning" that for this reason alone the matter should be referred to the Interstate Commerce Commission. This contention completely ignores the holding of the United States Supreme Court in the *Western Pacific* case, which is the latest and most definitive development of the doctrine. There the court said:

> "We say merely that where, as here, *the problem of cost-allocation is relevent*, and where therefore the questions of construction and reasonableness are so intertwined that the same factors are determinative on both issues, that it is the Commission which must first pass on them". *United States* v. *Western Pac. R. Co.*, 352 US 59, 69, 77 Sup. Ct. 161, 1 L. Ed. 2d 126 (1956) (emphasis added).

This is the *ratio decidendi* of that case. There is no statement here as to words with a "peculiar meaning". Courts decide contract actions where words have "peculiar meanings" every day of the year. If a railroad could always avoid judicial construction of its tariffs by merely inserting words with a "peculiar meaning" tariffs would rapidly assume even greater incomprehensibility than they do now. This would be an invitation to obfuscation. In fact the *Follmer* opinion is helpful here. That Court of Appeals stated:

> "This second issue seems to us to be a question of construing the contract the parties have made, deciding whether there has been a breach and whether any rights have been waived or otherwise lost. The terms used seem to us to provide no more technical difficulties than a contract growing out of business in the textile industry or the purchase and sale of products from a steel fabricating plant. Their interpretation is not intermixed with the peculiarly administrative function of determining the reasonability of rates charged." *New York, Susq. & Western R. Co.* v. *Follmer*, supra, at 513.

The reasonableness of rates or questions of classification which are necessarily intertwined with reasonableness of rates are matters for referral, as the *Western Pacific* case properly held. But the railroad appears to contend that any questions which raise "issues of transportation policy" (Respdt's br. p. 36) should be referred. If this is the law then why the tortuous route that the United States Supreme Court has wended, carefully trying to fit each case into the pigeonhole of either *Merchants Elevator* or *American Tie*? Both lines of authority involve "issues of transportation policy". But the test is not such vagueness. It is whether the interpretation of the tariff involves problems of cost-allocation. The record here is utterly devoid of any evidence that the issues in these cases involve problems of cost-allocation.

POINT IV.

REFERRAL TO THE INTERSTATE COMMERCE COMMISSION IS BARRED BY THE STATUTE OF LIMITATIONS.

The railroad raises the question of the possible bar of a referral by the Statute of Limitations. (Respdt's br. p. 34-35). This issue was raised in the *Western Pacific* case, the Supreme Court pointing out that Section 16 (3) (a) of the Interstate Commerce Act "makes it clear that where a carrier sues a private shipper, the action must be brought within two years". *United States* v. *Western Pac. R. Co.*, supra, at 70. But, that court points out, as the shipper in that case was the United States, the six year statute of the Tucker Act would apply (which statute would not be applicable here). The Court held that the suits themselves were timely brought and addressed itself to the question of the effect of the statute on a referral.

The Supreme Court is then faced with several cases construing Section 16 (3) as "jurisdictional". (It should be recalled that in Western Pacific it was the government, the shipper-defendant, who requested the referral.) The court distinguished them as follows:

> "The teaching of the Midstate Case (*Midstate Horticultural Co.* v. *Pennsylvania R. Co.* 320 US 356, 88 L. Ed. 96, 64 S. Ct. 128) for instance, is that the running of the statute

> destroys the *right* to affirmative recovery as well as the remedy, so the period of limitations cannot be waived by the parties. But here the government is not asserting a right to affirmative recovery. It is seeking only to have adjudicated *questions raised by way of defense.*" *United States* v. *Western Pac. R. Co.*, *supra*, at 72-73 (emphasis added).

The court next discusses *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 US 304, 57 L. Ed. 1494, 33 Sup. Ct. 938 (1913), where a shipper sued a carrier. The Court there held that the case raised issues cognizable only by the Interstate Commerce Commission. The court in *Western Pacific* then summarized the ruling in *Morrisdale* as follows:

> "* * * the Court held that the statute could not be evaded by filing suit in the District Court, rather than before the Commission, and then having the barred claim adjudicated by referral to the latter. In effect the holding was that the plaintiff had evoked the wrong tribunal, and that since limitations barred suit before the correct tribunal, no referral could be made to the latter." *United States* v. *Western Pac. R. Co.*, supra at 73.

The court in *Western Pacific* distinguished *Morrisdale* as not barring "referral of *defenses* properly and timely brought". *Id.* The court then said "We hold, therefore, that the limitation of Section 16 (3) does not bar a reference to the Interstate Commerce Commission of *questions raised by way of defense* and within the Commission's primary

jurisdiction, as were these questions relating to the applicable tariff". *Id.*, at 74. (emphasis added)

It is strongly urged that the facts by which the *Morrisdale* case were distinguished in *Western Pacific* are not before this court. In the instant cases, the railroad sought to commence its actions in the Utah courts, in many instances only a few days before the two year statute of limitations ran, as shown from the face of the pleadings. Then over a year after the cases were at issue the railroad-plaintiff decided to ask for referral. This clearly is not a case of "reference to the Interstate Commerce Commission of questions raised by way of defense". These are questions which form the very basis of its right of affirmative relief. The railroad by its own characterization of the issues as being properly within the Commission's primary exclusive jurisdiction, has conceded it chose the wrong forum. It cannot use the Utah court as an instrumentality to prevent the running of the applicable statute of limitations.

POINT V.

ASSUMING ARGUENDO THAT THE INTERSTATE COMMERCE COMMISSION DOES HAVE EXCLUSIVE PRIMARY JURISDICTION, THEN THE TRIAL COURT SHOULD HAVE DISMISSED THESE CASES.

The railroad contends that "once the determination is made that the agency should make the decision of certain questions, its jurisdiction is exclusive"

(Respdt's br. p. 16). Assuming *arguendo* the validity of the argument, then the trial court should have dismissed the case.

A case cited by the railroad, although not on this point, bears directly on this issue. In *United States* v. *Appicella*, 148 F. Supp. 457, (D., N.J. 1957), the Court of Appeals for the Third Circuit had vacated a judgment in favor of the government in view of the decision in *Western Pacific*. The question before the trial judge was whether the action should be dismissed or retained pending referral. The court made a thorough and helpful analysis of the cases. It quoted from the *American Tie* case where the court said "It results that error was committed by the court in declining to sustain the motion to dismiss for want of jurisdiction and therefore it is our duty to reverse", *Texas & Pacific Ry. Co.* v. *American Tie and Timber Co.*, 234 US 138, 149, 34 Sup. Ct. 885, 58 L. Ed. 1255 (1914).

It quoted from *United States* v. *Interstate Commerce Commission* 337 US 426, 437, 69 Sup. Ct. 1410, 1417, 93 L. Ed. 1451 (1949). "But it has been established doctrine since this Court's holding in *Texas & Pacific Ry. Co.* v. *Abilene Cotton & Oil Co.*, [citing] that a shipper *cannot file* a section 9 proceeding in a district court where his claim for damages necessarily involves a question of 'reasonable-

ness' calling for exercise of the Commission's primary jurisdiction (emphasis supplied)". The trial Judge pointed out that in *Far Eastern Conference* v. *United States*, 342 US 570, 72 Sup. Ct. 492, 96 L. Ed. 576 (1952), the Supreme Court held the complaint should be dismissed and not held in abeyance by the District Court.

The trial judge observed that the government's effort to have the court retain jurisdiction was based upon a fear generated from the *Western Pacific* case.

> "In short, the United States realizes that the statutory limitation on bringing a complaint to the Interstate Commerce Commission would bar recourse to that body. But this is no reason for this court to retain a cause over which it has no jurisdiction in the first place. The motion to dismiss is granted", *United States* v. *Apicella, supra*, at page 460.

The railroad seeks to avoid this dilemma by contending that there are issues still within the general jurisdiction of the state court (respdt's br. p. 50). It cites for an example the awarding and enforcing of damages. But as the judge in the *Apicella* case pointed out, the questions referred to the Interstate Commerce Commission are not clearly severable from the issue of liability for the alleged charges. There would be no undercharge if the commission determined that the defendant here was properly complying with the tariff.

The possible running of a statute of limitations is not grounds for a stay as the *Apicella* case shows. Indeed the *Western Pacific* court must have agreed, for it spent considerable space in its opinion pointing out that the statute did not bar reference of questions raised in defense, a problem which could have been easily overcome by merely staying proceeding in the trial court pending referral, if it felt that this would be possible.

An additional reason for dismissal becomes apparent when respondent in its brief finally makes clear its understanding of the procedure to be followed pursuant to the trial court's order. The railroad denies that the state court ordered the Interstate Commerce Commission to make a determination (Respdt's br. p. 34)* The railroad contends that a determination by the commission "would then be based on an independent petition by the respondent for a declaratory order pursuant to Section 5 (d) of the Administrative Procedure Act."

But under the Federal Administrative Procedure Act review lies exclusive through the *Federal* courts (5 USCA § 1001 et seq.).

Moreover by express federal statute, procedure is established for enforcement, injunction, annulment or setting aside of orders of the Interstate

* Despite the fact that the order recites "it is further ordered that the Commission make such further report and determination . . ."

Commerce Commission in the United States District Courts. As the United States Supreme Court has stated, "Federal District Courts have exclusive jurisdiction of suits to enjoin, set aside, annul or suspend an order of the commission. In such suits the United States is an indispensable party." *Seaboard Airline R. Co.* v. *Daniel*, 333 US 118, 122, 92 L. Ed. 580, 585, 68 Sup. Ct. 426 (1948).

Thus it is clear that the matter is not as simple as stated by the railroad (e.g. "Thus both finding of fact and conclusion of law would be returned to the trial court") (Respdt's br. p. 48). Any review of the Commission's finding must proceed through the federal court system. This points up the dual incongruity of the railroad's argument. It seeks to have issues resolved by a federal commission which has no jurisdiction over defendants, and then asks that the findings be returned to a state court which has no jurisdiction to review them. These actions should be dismissed in any event to allow defendants full scope of review within the proper jurisdictional system.

Respectfully submitted,

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